NATIONAL COMPANY FOR FOREIGN TRADE

v.

KAYU RAYA SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 246 OF 1983]
14 JULY 1984

CIVIL PROCEDURE: *Consideration - Whether should be specifically pleaded in statement of claim - Summary judgment - Order 14, Rules of the High Court - Whether should be refused - Whether triable issue disclosed.*

The appeal was from a judgment of the High Court reversing a decree of the Assistant Registrar directing that summary judgment be entered in favour of the appellant under O. 14 of the Rules of the High Court 1980. A preliminary submission was made on the rule of practice on the observation by the High Court Judge in his judgment that "consideration" ought to be expressly pleaded in the statement of claim.

Held:

[1] The Court was unable to agree with the observation of the Judge that "consideration" must be expressly pleaded under O. 18 r. 7(1). Order 18 r. 15 does not support the statement in the "White Book" that consideration for any agreement not under seal is a material fact and must be pleaded. In any case, since "consideration" is defined by s. 2(d) of the Contracts Act 1950, it cannot be regarded as a material fact.

[2] The respondent had satisfied the Court on affidavit evidence that there is an issue or question in dispute which ought to be tried.

(a) Where a Judge has decided there is a triable issue on a question of fact, the appellate Court would be unlikely to interfere. On the other hand, if the appellate Court differed from the Judge only on issues of law, the appellate Court should substitute its own view for that of the Judge and give judgment for the plaintiff under O. 14 r. 3(1). Such an appeal will be treated as rehearing.

(b) For the purpose of an O. 14 application, the statement of claim must be complete and good in itself; any defect or omission cannot be corrected or supplemented by the plaintiff's affidavit. Furthermore, if the defect is one of substance, the application for summary judgment will be dismissed.

[Appeal dismissed.]

Case referred to:

Syros Shipping Co. v. Elaghill Trading Co. [1981] 3 All ER 189
European Bank v. Punjab Bank (No. 2) [1983] 1 WLR 642
Gold Ores Reduction Co. v. Pain [1892] 2 QB 14
Sheba Gold Mining Co. v. Trubshawe [1892] 1 QB 674

Legislation referred to:

Rules of the High Court 1980, O. 14, rr. 1(2), 3, (1), 4(1), O. 75, r. 5(1), O. 18, rr. 11, 15, 17
Contracts Act 1950, s. 2(d), (e), (h)

Other sources referred to:
Bullen & Leacke's Precedents of Pleadings
Atkin's Court Forms, Vol. 12
The 'White Book', para. 18 p. 127
The Export Trade, Clive Schmitthoff

For the appellant - Wong Chong Wah; M/s. Skrine & Co.
For the respondent - C. Abraham; M/s. Shearn Delamore & Co.

JUDGMENT

George Seah FJ:

This is an appeal from a judgment of the High Court dated 15 July 1983 reversing a decree of the Assistant Registrar directing that summary judgment be entered in favour of the appellant/plaintiff in the sum of S$846,930 with interest and costs under O. 14 of the Rules of the High Court 1980. Before dealing with the merit of the appeal we would like to dispose of a preliminary submission on the rule of practice. In his grounds of judgment the learned Judge seems to take the view that "consideration" ought to be expressly pleaded in the statement of claim. In support of this view learned Counsel for the respondent/defendant relies on a passage appearing in para. 18/12/7 of the "*White Book*" which reads:

> Consideration for any agreement not under seal is a material fact and must be pleaded, except in the case of negotiable instruments where it is presumed.

It was pointed out by learned Counsel for the appellant that no authority binding on this Court has been cited to support this proposition and the comment of the learned authors appears to be contrary to the specimen Court forms contained in *Bullen & Leake's Precedents of Pleadings* and *Atkin's Court Forms*, Vol. 12 dealing with the statement of claim.

We have examined the specimen forms of statement of claim based on agreements not under seal in *Bullen & Leake's Precedents of Pleadings* and *Atkin's Court Forms* and we are unable to find anything to indicate that "consideration" ought to be pleaded specifically. On the other hand, if the defence is to be based on "no consideration" or "a failure of consideration" then the specimen forms show clearly that such a defence should be expressly pleaded [see O. 18 r. 11].

Now, O. 18 r. 15 of the Rules of the High Court 1980 states that:

> 15 (1) A statement of claim must state specifically the relief or remedy which the plaintiff claims; but costs need not be specifically claimed.
>
> (2) A statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned; but, subject to that, a plaintiff may in his statement of claim alter, modify, or extend any claim made by him in the indorsement of the writ without amending the indorsement.

In our judgment, O. 18 r. 15 does not support the statement contained in para. 18/12 of the "*White Book*".

A "consideration" is defined by s. 2(d) of the Contracts Act 1950 as "when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise". And "every promise and every set of promises, forming the

consideration for each other, is an agreement" [See s. 2(e)]. An agreement enforceable by law is a contract [s. 2(h)]. In our opinion, since "consideration", "agreement" or "contract" have been statutorily defined they cannot be regarded as material facts and therefore need not be specifically pleaded in the statement of claim under O. 18 r. 7(1). For the above reasons, we are unable to agree with the observation of the learned Judge.

We come now to consider the merit of the appeal. It was submitted by learned Counsel for the appellant that the learned Judge in the High Court was wrong to hold that the statement of claim does not disclose an enforceable contract. In so holding, it was contended that the learned Judge was under the misapprehension that "consideration" ought to be specifically pleaded in the statement of claim. We think it appropriate to remind ourselves once again that in every application under O. 14 the first considerations are (a) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O. 14. For the purposes of an application under O. 14 the preliminary requirements are:

(i) the defendant must have entered an appearance;

(ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of r. 2 of the O. 14.

It is to be observed that a case is not within O. 14: (a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ includes a claim or claims outside the scope of O. 14 as coming within r. 1(2); (c) where the affidavit in support of the application is defective, e.g. in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates; (d) where the application is made in an action against the Government [O. 73 r. 5(1)].

If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he comes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him [see O. 14 r. 3 and 4(1)].

We will assume for the purpose of this appeal that the preliminary requirements have been satisfied and that the case comes within the provision of O. 14.

It seems to us that the main thrust of the defence of the respondent is contained in paragraph 7 of the affidavit of Ahmad Kamaruzaman bin Mohd. Baria dated 14 November 1982 in which he states that "I very believe that agreed minutes which the plaintiff (appellant) relied on was made without due consideration and in the circumstances bad in law". The question before us is whether the respondent by this affidavit has satisfied the learned trial Judge that a *bona fide* arguable defence has been raised which ought to be tried.

In *European Bank v. Punjab Bank (No. 2)*[1983] 1 WLR 642 it was decided by the Court of Appeal consisting of 2 Lord Justices (Slade and Robert Goff LJJ) that where a Judge has decided there is a triable issue on a question of fact, the Court of Appeal would be unlikely to interfere. On the other hand, if the Court of Appeal differed from the Judge only on issues of law, the Court of Appeal should substitute its own view for that of the Judge and give judgment for the plaintiffs under O. 14 r. 3(1). And in practice, this Court will simply approach an appeal of this kind as a rehearing.

Now the facts in this case do not appear to be in dispute and they may be shortly stated.

(a) The appellant are statutory state trading entity having its principal place of business in Aden and the respondent are a private limited company incorporated in Malaysia.

(b) on 16 March 1979 by an agreement in writing under reference KR/NCFT/14/79 the appellant agreed to buy and the respondent agreed to sell 19,392 tons of "Keruing" sawntimber to be shipped from various ports in Malaysia to Aden by the respondent from the months of April to December 1979. The terms of payment were US$232 per ton of 50 cu. ft. C & F full liner terms port of Aden, PDRY (Peoples Democratic Republic of Yemen).

(c) In July 1979 the respondent shipped 6049 tons of sawntimber on board the vessel "Senang Island" from Kuantan. The appellant duly made payment under the terms of the said agreement to the respondent in respect of this shipment.

(d) Whilst enroute to Aden the vessel "Senang Island" was arrested in Singapore and the said cargo of sawn timber was unloaded at Singapore.

(e) On 8 October 1979 the respondent agreed to take full responsibility to reship the 6049 tons of sawntimber from Singapore to Aden by another vessel and also agreed to be liable for the freight charges as well as all incidental expenses arising from the cargo being unloaded and stored in Singapore pending reshipment to Aden.

(f) On 9 December 1979 arrangement was made for the shipment of 6049 tons of sawntimber from Singapore to Aden by the vessel "Kota Abadi" and the total freight charges amounting to S$907,350 to be borne by the respondent.

(g) The appellant advanced the freight charges of S$907,350 at the request of the respondent and on the express undertaking of the respondent to reimburse the appellant the aforesaid sum less a sum of S$60,405,00 which the appellant had agreed to bear, on or before 31 December 1979.

(h) Despite numerous demands the respondent had failed/refused to effect payment of the sum of S$846,930 to the appellant.

We would pause here to say a few words about agreement on C & F terms. According to a book entitled "*The Export Trade*" by Clive Schmitthoff, C & F stands for "Cost and Freight". Under this clause the seller has to arrange the carriage of the goods to the named foreign port of destination at his expense but not at his risk (which ceases when he places the goods on board ship at the place of shipment) but he has not to arrange marine insurance which is the concern of the buyer and, if effected, has to be paid by him. In this respect the clause differs from the ordinary CIF clause, but in all other respects the liabilities and duties of the parties are the same as under a CIF contract.

Learned Counsel for the respondent submitted that under a C & F contract the legal responsibility of the respondent/seller ceased when the sawntimber were loaded on board the vessel "Senang Island" at Kuantan. And when the vessel "Senang Island" was arrested in Singapore the appellant applied to the Singapore High Court to off-load the sawntimber so that they could be reshipped to Aden by another vessel. By so doing the appellant exercised right of ownership over the sawntimber inasmuch as the property of the sawntimber had passed or was deemed to have passed to the appellant at the place of shipment in Kuantan. It was therefore argued that when the respondent signed the Agreed Minutes on

8 October 1979 and undertook full responsibility to reship the 6049 tons of sawntimber from Singapore to Aden in another vessel at the respondent's own expense including the payment of freight, there was no consideration to support the alleged agreement.

Reliance was placed in the case of *Syros Shipping Co. v. Elaghill Trading Co.* [1981] 3 All ER 189. In that case the shipowners chartered their vessel to the characters who used it to carry a consignment of tractors from Sweden to Yemen. The freight was prepaid by the Yemeni consignees to the charterers and bill of lading signed by the master of the vessel and binding on the owners were issued to the consignees. In the course of the voyage the charterers became insolvent and defaulted in the payment of hire to the owners. Because of congestion in the port at Yemen, the owners ordered the vessel to proceed to other ports to discharge the rest of her cargo. Before the vessel returned to the Yemen port the owners negotiated with the consignees for an extra payment for the discharge of the cargo free of any liens. The consignees agreed to pay an extra US$31,000 over and above the freight already paid. However, when the cargo had been discharged the consignees refused to pay the US$31,000. The dispute was referred to an arbitrator who held that there was no consideration for the agreement but that the consignees were nevertheless estopped from departing from the agreement. The arbitrator therefore upheld the owners' claim. The consignees applied to have the award set aside on the ground that it contained an error of law on its face.

Lloyd J held that the shipowners had no claim, other than by virtue of the agreement, for the US$31,000 they were seeking to recover from the consignees, and in the absence of consideration they could not enforce that agreement or rely on equitable estoppel as creating an independent cause of action.

For the appellant it was contended that *Syros Shipping* case can be distinguished from the instant case in that there was a "naked promise" in *Syros Shipping* case whereas here, the Agreed Minutes of 8 October 1979 represented a Compromise Agreement which was reached by the appellant and the respondent after a series of meetings commencing from 1 to 8 October 1979 resulting in the settlement of the following three issues, viz.:

(a) the vessel "Senang Island";

(b) outstanding order of Contract dated 16 March 1979 under reference KR/NCFT/14/79:

(c) balance of the order under Indent BC/63/78.

With respect, these do not appear to have been pleaded by the appellant. In the statement of claim it is alleged that following the undertaking by the respondent to reship the sawntimber and to be responsible for the cost of freight charges from Singapore to Aden the parties had agreed on new dates regarding the shipment of the balance of the sawntimber under the said contract. Although not pleaded learned Counsel for the appellant further submitted that on 16 October 1979 the appellant and the respondent signed another fresh sale and purchase agreement *vide* KR/NCFT/44/79 in respect of 11,600 tons of "Keruing sawntimber (Redwood)".

In *Gold Ores Reduction Co. v. Pain* [1892] 2 QB 14 it was held that for the purpose of O. 14 application the statement of claim must be complete and good in itself; any defect or omission cannot be corrected or supplemented by the plaintiff's affidavit. Furthermore, if the defect is one of substance, the application for summary judgment will be dismissed (See *Sheba Gold Mining Co. v. Trubshawe* [1892] 1 QB 674).

Applying these to the facts of this case, we tend to agree with the decision of the learned Judge that the application for the summary judgement under O. 14 ought to be refused. Unlike the learned Judge, we prefer to base it on the ground that the respondent has satisfied the Court on affidavit evidence that there is an issue or question in dispute which ought to be tried. The appeal is therefore dismissed with one-half costs to the respondent to be taxed. The deposit of $500 to be paid to the respondent on account of taxed costs. We would order that the trial take place before another Judge.

Also found at [1984] 2 CLJ 220